

1 UNITED STATES DISTRICT COURT:
2 WESTERN DISTRICT OF VIRGINIA, CHARLOTTESVILLE DIVISION

3 *****
4 UNITED STATES

5
6 -vs- Case No.: 02-M-426-1

7 JAMES DANIEL BRAY,

COPY

8 Defendant.
9 *****

10 PROCEEDINGS BEFORE THE HONORABLE

11 B. WAUGH CRIGLER, JUDGE

12 10:00 a.m. - 11:30 a.m.

13 November 21, 2002

14 Charlottesville, Virginia

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25 REPORTED BY: Karina L. Chesbrough, Court Reporter

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Proceedings before the Honorable B. WAUGH
CRIGLER, Judge, taken and transcribed by Karina L.
3 Chesbrough, Court Reporter, Notary Public in and
4 for the Commonwealth of Virginia at large,
5 commencing at 10:00 a.m., November 21, 2002, at
6 the United States District Court, Charlottesville
7 Division, Charlottesville, Virginia.

A P P E A R A N C E S

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I N D E X

WITNESS:

LES LAUZIÈRE

Examination by Mr. Miller.....10, 43

Examination by Ms. Hudson.....42

* * * * *

1 THE COURT: Let the record reflect that
2 this is magistrate docket number 02-M-426,
3 U.S. versus James Daniel Bray, who is present
4 in person with his retained counsel,
5 Mr. Miller. And the Government is
6 represented by Ms. Hudson. The record should
7 reflect that just the other day I received a
8 letter under cover of November the 19th from
9 Mr. Miller enclosing a motion, but I couldn't
10 tell whether that was an original signature
11 or not and whether Mr. Miller wanted to file
12 the motion in advance or whether he wanted to
13 file it in open court. But a copy was shown
14 being sent to Ms. Hudson. And Mr. Miller is
15 tendering to the Court the original motion
16 and a copy of the letter. So I'll have the
17 clerk file it in open court.

18 MR. MILLER: Thank you, Your Honor. I
19 had sent it to Ms. Hudson, I had sent it to
20 Mr. Smith. I found out this morning they
21 didn't have it. And he's in Roanoke and I
22 gave Ms. Hudson another copy I brought
23 because I didn't know who was going to get it
24 and who wasn't. I also brought the original
25 in case you didn't get yours either.

1 THE COURT: I didn't. We only got the
2 copies.

3 MR. MILLER: All right. I'm sorry,
4 Your Honor.

5 THE COURT: Hey, it's all cured.

6 MR. MILLER: Thank you, Your Honor.

7 MS. HUDSON: Your Honor, before we
8 begin, Mr. Miller and I had discussed briefly
9 a couple of matters in the hallway before
10 this case was called. The Government
11 obviously as the Court knows filed a
12 complaint in this case. There is an
13 Attachment C to the complaint. The
14 Government would now move to substitute a
15 redacted Attachment C only removing the first
16 name of the minor children who are mentioned
17 in that letter. And Mr. Miller and I have a
18 joint motion to seal the unredacted version
19 that is attached to the complaint that is --

20 THE COURT: Is that the version that
21 was the envelope along with the handwritten
22 document?

23 MS. HUDSON: Yes, sir. And I have --

24 THE COURT: Some 15, 20 -- 15 or 17
25 pages?

1 MS. HUDSON: Yes, sir. And with the
2 Court's permission, this is the redacted
3 version that we'd ask be made a part of the
4 public record.

5 THE COURT: Any objection?

6 MR. MILLER: No, Your Honor. We -- the
7 sealing of the unredacted is agreeable. And
8 there's one other point, if we can approach
9 and put that in the record to explain a
10 little bit further the --

11 MS. HUDSON: Some verbal
12 representations that we would request also be
13 placed under seal in the record.

14 THE COURT: What I will do is just ask
15 that everybody but the court personnel, my
16 bailiff, and a United States Marshal
17 representative exit the courtroom
18 temporarily.

19 MR. MILLER: Your Honor, this is so
20 short.

21 THE COURT: Yeah, but it has to go on
22 the record.

23 MR. MILLER: Yes, Your Honor. Okay.

24 MS. HUDSON: May my case agent stay
25 present as well, Your Honor?

1 THE COURT: Well, he knows the
2 information. So everybody else just
3 temporarily go out. It's going to be less
4 than two minutes.

5 MR. MILLER: Mr. Dwoskin is counsel for
6 Mr. Bray in state court.

7 MS. HUDSON: And, Your Honor, Linda
8 Hicks Thomas is also here from the Attorney
9 General's office and is going to be
10 co-counsel. She is a Special Assistant U.S.
11 Attorney in our office.

12 THE COURT: So recognized. And is
13 there any objection to having the probation
14 officer here who's going to be doing all
15 pretrial matters?

16 MR. MILLER: No.

17 MS. HUDSON: No, sir.

18 THE COURT: All right. There we go.
19 We got two people out. Everybody else stays
20 in.

21 MR. MILLER: Sorry, Judge. For the
22 record -- and the real long matter, if Your
23 Honor pleases, is this. The individual
24 designated as "A" in quotes is Jessica and
25 the individual designated as "B" is Danielle,

1 just so the record is clear as to who we're
2 dealing with in there. And the unredacted
3 now under seal should reflect that, but we
4 just want to make sure that the case is on
5 the same page as to who it is. And we'd ask
6 that that also be put under seal, this one
7 representation be under seal. And that's all
8 we have, Your Honor.

9 MS. HUDSON: And would the Court need a
10 written motion and order from the Government
11 to put that in the record?

12 THE COURT: Well, I think the motion on
13 the record of the case is sufficient. And
14 what I'm going to direct the clerk is to seal
15 the version that I have under a paper clip to
16 be opened only upon order of the Court and
17 then substitute for that the version that
18 was -- he's going to mark stamped -- he's
19 going to stamp it filed in open court, and
20 I'm going to order that it be substituted for
21 the original that was part of the criminal
22 complaint.

23 MS. HUDSON: Thank you, Your Honor.

24 THE COURT: And that's -- yeah. And
25 that will do it. Now you can bring everybody

1 back in. And while they're coming back in,
2 Mr. Miller, do you wish a preliminary hearing
3 today on these matters?

4 MR. MILLER: Yes.

5 THE COURT: Well, and I take it that
6 they'll be referred to as "A" and "B?"

7 MS. HUDSON: Yes, sir. They are --
8 just for the record as well, and for the
9 Court to note, in the main portion of the
10 affidavit Mr. -- Inspector Lauziere refers to
11 them as minor "A" and minor "B."

12 THE COURT: And is there any objection
13 to conducting currently the preliminary
14 examination and the bail, the evidence
15 relating to the Defendant for purposes of
16 bail?

17 MR. MILLER: No, not on behalf of the
18 defense, Your Honor.

19 THE COURT: I mean, it doesn't keep you
20 from putting on additional -- I'm just doing
21 both proceedings at the same time. He's
22 requested a bail hearing.

23 MS. HUDSON: Could we proceed with the
24 cross examination on the complaint for
25 purposes of the preliminary and then permit

1 the Government to put on evidence immediately
2 after that?

3 THE COURT: Absolutely. No problem.
4 But -- 'cause generally what you do is say,
5 well, we rely on the affidavit and then I
6 just force you to tender your witness for
7 cross examination by the defense counsel.

8 MS. HUDSON: That's what I'd prefer.

9 THE COURT: Is that what you're doing
10 today?

11 MS. HUDSON: Yes, sir.

12 THE COURT: Mr. Lauziere, do you swear
13 or affirm that what you testify to today is
14 truthful under penalty of perjury?

15 L E S L A U Z I E R E , called as a
16 witness and being duly sworn, testifies as
17 follows:

18 THE COURT: All right. You want to
19 take the stand here and be cross examined by
20 Mr. Miller? All right, Mr. Miller.

21 BY MR. MILLER:

22 Q. Now, Mr. Lauziere, do you have before
23 you the affidavit which I will assume has been
24 tendered as Government's Exhibit 1?

25 A. Yes.

1 THE COURT: It's not an exhibit. It's
2 been substituted as an -- as the --

3 MR. MILLER: Proffer.

4 THE COURT: Right.

5 Q. Would you please refer to the first
6 paragraph and the last line of it?

7 THE COURT: That's on Page 17?

8 MR. MILLER: Page 1 of the affidavit.

9 A. As a part of this current official
10 duties?

11 Q. Yes. And if you'll look at the very
12 last line, last sentence of the first paragraph.

13 A. As a part?

14 Q. Yes. Just look at that, and then my
15 question to you, sir, is how many online
16 enticement cases have you been involved in?

17 A. I suppose probably 15 or 20, maybe
18 more.

19 Q. Over how many years? Over the 26
20 years?

21 A. Over -- yeah, probably most of those
22 over the last 10.

23 THE COURT: You know you've got a
24 quizzical look from the United States
25 Attorney when you asked that question 'cause

1 she's questioning how much probable cause
2 that goes to. Go ahead.

3 MR. MILLER: Yes, Your Honor. I think
4 it does go to it because of the preamble to
5 the affidavit by the officer.

6 Q. Now, turning to paragraph number one on
7 Page 2.

8 A. Yes, I see it.

9 Q. Are you aware that the motel room was
10 under surveillance for a period of hours before
11 the officers entered?

12 A. I don't know for what period of time it
13 was under surveillance. I know it was under
14 surveillance for a period of time. I don't know
15 how many -- if it was hours or minutes. I don't
16 know.

17 Q. Are you aware that "A" was followed
18 from her home to that location?

19 MS. HUDSON: Objection, Your Honor.

20 THE COURT: What's the basis of the
21 objection, Ms. Hudson?

22 MS. HUDSON: There's nothing regarding
23 the whereabouts or the behavior of minor "A"
24 in paragraph one. It just seems like he's
25 raising a completely separate issue from

1 anything alleged in the affidavit.

2 THE COURT: I just don't understand
3 where that goes to probable cause whether
4 they watched him or didn't watch him, whether
5 they trailed him or didn't trail him, whether
6 they permitted it to occur or didn't permit
7 it to occur. Where does that go to probable
8 cause?

9 MR. MILLER: It goes to -- the series
10 of questions will determine whether there was
11 enticement or not.

12 MS. HUDSON: We're not here to try the
13 case, Your Honor.

14 MR. MILLER: They made the allegation
15 and you're to determine whether or not
16 there's probable cause. And they've made
17 this as an allegation. Now, if they want to
18 withdraw paragraph one and take it from the
19 Court's consideration, that's fine. If
20 they're going to offer it to the Court as
21 evidence, then we get to cross examine the
22 validity of it. At least that's my
23 understanding of what --

24 THE COURT: You only get to cross
25 examine it to the extent that it can't as a

1 matter of law establish probable cause.

2 MR. MILLER: Or to the extent that it's
3 not credible as a statement of fact.

4 THE COURT: As a matter of law. It
5 would have to be as a matter of law
6 incredible.

7 MR. MILLER: No. The Court in a
8 preliminary hearing can determine that as a
9 matter of law it's not relevant to the
10 determination and therefore shouldn't be
11 considered. The Court can determine based on
12 evidence presented to it that the factual
13 basis is not worthy of consideration.

14 THE COURT: But I would have to
15 determine that the evidence is not credible
16 as a matter of law, that no reasonable
17 determiner of probable cause could say that
18 that would constitute a basis for probable
19 cause.

20 MR. MILLER: No, not that it wouldn't
21 determine a basis for it, but that it wasn't
22 credible, therefore shouldn't be considered.
23 If it was true --

24 THE COURT: You can dance on that pin
25 in the Court of Appeals. I sustain the

1 objection.

2 MR. MILLER: The position, Your Honor,
3 so the record is clear -- I'm not trying
4 to --

5 THE COURT: I'll let you challenge the
6 credibility of the evidence, and if you --
7 I'm going to give you some leeway, but I'm
8 not going to go down the road that you want
9 me to go down. I think the parameters are
10 clear. So I will allow you to challenge the
11 credibility of the evidence so long as -- so
12 long as the question before the Court is
13 whether there's any credibility as a matter
14 of law. Whether I believe this man or not
15 isn't the issue. It's whether it could be
16 believed by a reasonable person determining
17 probable cause.

18 MR. MILLER: I think -- and I'll
19 just -- we can lay this to rest. I think
20 that the Court as the fact finder is
21 obligated to make its own credibility
22 determinations of the evidence not as a
23 matter of law, but as whether or not the
24 Court credits it. Then if the Court credits
25 it, the Court makes the second determination

1 as to whether or not it supports the
2 proposition for which it's offered. I think
3 it's a two-step process.

4 THE COURT: I'll consider that. Go
5 ahead.

6 Q. Now, are you aware that this was not an
7 enticement but was an arranged meeting that had
8 certain involvement of the police in arranging the
9 meeting to take place?

10 MS. HUDSON: Objection, Your Honor.
11 He's asking a legal question.

12 THE COURT: Sustained.

13 MR. MILLER: No, that's a factual
14 question, Your Honor. Police involvement in
15 setting up the meeting.

16 MS. HUDSON: You asked whether it was
17 an enticement.

18 THE COURT: I agree. I sustain the
19 objection. It's argumentative.

20 MR. MILLER: I'll reword it.

21 Q. Are you aware that the police were
22 involved in setting up the meeting -- local police
23 officers?

24 MS. HUDSON: Could we clarify what
25 meeting he's talking about?

1 MR. MILLER: Paragraph one, 15 February
2 2002.

3 MS. HUDSON: Objection. It doesn't go
4 to the probable cause. Paragraph one deals
5 with the subject of a prior conviction of
6 Mr. Bray's and briefly sets forth those facts
7 for the purpose of identifying that there was
8 a minor "A" who had some past history with
9 Mr. Bray of a criminal nature according to
10 Virginia code and according to his prior
11 conviction. It has nothing to do with --
12 other than as it is in that context with the
13 current allegations of enticement that have
14 more to do with Attachment C to the
15 affidavit.

16 MR. MILLER: Your Honor, that's
17 argument. The affidavit in its own words
18 says what the purpose -- how the meeting came
19 about, and it talks about how the meeting
20 came about.

21 THE COURT: Answer the question.

22 Q. Do you know whether or not local law
23 enforcement were involved in setting up this
24 meeting?

25 A. When you say were involved, I --

1 Q. In arranging it to take place.

2 A. I don't believe that, no.

3 Q. Okay. Now, are you aware -- your
4 knowledge on this information is garnered from
5 police reports and investigative reports of others
6 that you read?

7 A. Not totally, no.

8 Q. Regarding the incidents of 15
9 February 2002 is it based on police reports and
10 incident reports and interviews with officers?

11 A. Not totally, no.

12 Q. Were you present?

13 A. No.

14 Q. Other than interviews with the officers
15 and police reports since you weren't present, did
16 you have occasion to observe photographs that the
17 police took of the scene right after their entry?

18 A. No, I did not.

19 Q. So have you seen any -- and by
20 photographs I will for the record mean also any
21 videos or still photographs.

22 MS. HUDSON: Objection, Your Honor.

23 MR. MILLER: Basis of his knowledge,
24 Your Honor, that's what I'm getting to.

25 MS. HUDSON: Your Honor, I think a

1 question could be asked, but I think the
2 breadth and the detail of this question is
3 objectionable.

4 THE COURT: Well, the fact that he
5 wants to detail it in that way, he is
6 examining this witness. I overrule the
7 objection. Answer the question to the best
8 of your knowledge.

9 A. I did not see any videotapes.

10 Q. Did you see any photographs?

11 A. No, I did not.

12 Q. Okay. What is the other source of your
13 information if it's not personal knowledge or
14 based on information from officers, because you
15 indicate that --

16 THE COURT: Why don't you just ask the
17 question?

18 Q. Okay. What is your other basis of
19 information?

20 A. It's also from the victim's family.
21 It's also from other law enforcement officers.

22 Q. So law enforcement officers and the --
23 by the family, do you mean the parents of "A?"

24 A. Yes.

25 Q. Now, there is mention in the bottom of

1 this paragraph of a seizure of computers and
2 diskettes, et cetera. Were you involved in that
3 seizure or is that based on records that you
4 reviewed?

5 A. That seizure relates to the Virginia
6 search warrant that was executed at that time.

7 Q. Okay. Now, you work with the -- for
8 the record, you work with the Attorney General's
9 office of the Commonwealth of Virginia?

10 A. That's correct.

11 Q. And this warrant to which you make
12 reference is a state search warrant issued by a
13 state circuit court judge or a state magistrate,
14 do you know -- if you know?

15 A. I believe it was a magistrate.

16 Q. And was it a magistrate in the
17 jurisdiction in which the motel occurred; isn't
18 that correct?

19 MS. HUDSON: Your Honor, we will
20 stipulate this was a state case. Everything
21 about it was a state case.

22 MR. MILLER: I'm laying a foundation
23 for another proposition. I need to get the
24 facts.

25 THE COURT: What's the proposition?

1 MR. MILLER: I want to establish the
2 facts.

3 THE COURT: No, what's the --

4 MR. MILLER: Can we approach the bench
5 so the witness can't hear it?

6 THE COURT: What's the proposition? It
7 either has to be a legal matter --

8 MR. MILLER: It's a legal matter.

9 THE COURT: Well, just tell me.

10 MR. MILLER: That the evidence that --
11 to which they make later reference here would
12 not be admissible.

13 THE COURT: That's not a basis upon
14 which you can challenge it in this court at
15 this time. The rules are clear. Objection
16 sustained.

17 Q. Were you involved in obtaining this
18 state search warrant?

19 A. No, I was not.

20 Q. Were you involved in seizing the items
21 that are mentioned in the bottom of this
22 paragraph?

23 A. Off the state search warrant, no.

24 Q. Did they come into your possession at a
25 later time?

1 A. Yes, it did.

2 Q. And for the record, where is your
3 office?

4 A. In Richmond.

5 Q. Okay. How did they come into your
6 possession?

7 THE COURT: This is discovery and I'm
8 not going to let you go anymore. Challenge
9 the probable cause or quit.

10 MR. MILLER: I am intending to
11 challenge the probable cause.

12 THE COURT: Yeah, but you're doing it
13 round Robin Hood's barn and I'm just not
14 going to let you go there, Mr. Miller. It's
15 out of deference to you that I've stayed on
16 task as long as I have.

17 Q. Now, in February you indicate in
18 paragraph three that you were requested by
19 Detective Garland Mills to provide assistance. Is
20 that reference to you or is that reference to your
21 office? In other words, did they say, would you
22 please help us to you individually or was it in
23 reference to your office in a referral?

24 A. Well, they're one and the same, the
25 office and myself.

1 THE COURT: Makes no difference. If
2 you ask another question like that, I'm going
3 to sit you down.

4 Q. In that request, did they provide you
5 with documents and materials on which you relied
6 in crafting this affidavit?

7 A. Some of the materials may have been
8 part of it. I don't know which -- I'd have to
9 look and parse those out.

10 Q. Did you after that have interviews to
11 which you made reference in your earlier
12 examination? In other words, did that occur
13 chronologically before or after this time?

14 MS. HUDSON: Your Honor, I think the
15 agent has already answered that. He's
16 answered where he got all the information in
17 the case.

18 THE COURT: And he doesn't even have to
19 answer that except to the extent as showing
20 that they're credible sources. They don't
21 have to prove credibility of the particular
22 person. I don't know where this is heading,
23 but it's only going to last another two or
24 three minutes, Mr. Miller.

25 Q. In paragraph four, you conclude that

1 evidence obtained from Detective Mills disclosed
2 communications, and then you describe it, and you
3 say using electronic mail, America Online
4 Messenger, and e-mail accounts. That's the
5 conclusion that you give. What is the factual
6 basis for that conclusion?

7 A. My examination of that evidence.

8 Q. When you presented -- did you present
9 this affidavit to the Court for the issuance of
10 the complaint in this case?

11 A. Yes, I did.

12 Q. Okay. And did His Honor have presented
13 the materials that you reviewed for the conclusion
14 in paragraph four at that time?

15 A. Did I hand him --

16 THE COURT: You have in front of you
17 the complaint and what was attached to it.
18 You've got what I've got.

19 MR. MILLER: Okay. That was the point
20 of the question, Your Honor.

21 THE COURT: Now, if you're challenging
22 that, that's one thing. But, Mr. Miller,
23 it's an enigma to me about where you think
24 you're going with this.

25 MR. MILLER: There's a procedure where

1 there could have been additional testimony
2 recorded in a record not part of this.

3 THE COURT: That's discovery. Unless
4 this doesn't show probable cause.

5 MR. MILLER: This does not show
6 probable cause.

7 THE COURT: You tell me why.

8 MR. MILLER: Because under Leon it's a
9 wholly unsupported conclusion and they don't
10 allow it, that's why. In paragraph four --
11 though there could have been other evidence
12 that could have been presented in another
13 means that might have done that and then I'd
14 need to address that issue. If there was no
15 other, then that's it for paragraph four.
16 It's a wholly unsupported conclusion.

17 THE COURT: I don't look at just
18 paragraph four. I look at the entire
19 complaint and all of the things that were
20 attached to it to determine whether there's
21 probable cause.

22 MR. MILLER: I understand that, Your
23 Honor, but what I need to deal with is the
24 facts as I get to them in the series to see
25 whether or not there's enough of it that's

1 not permissible that leads to a diminution of
2 the probable cause allegation.

3 Q. Now, in paragraph five, the information
4 that you provided, is that also information that
5 was your conclusion based on your review of
6 someone else's records?

7 A. That was based on looking at the e-mail
8 account information obtained from the two
9 different sources.

10 Q. When looking at that e-mail account
11 information in five and a similar e-mail
12 information in paragraph four, had you obtained
13 that by use of a search warrant?

14 A. No. That was voluntarily provided.

15 Q. And did you review that material
16 yourself or is this something that was reported to
17 you secondhand?

18 A. I reviewed it.

19 Q. Paragraph six refers to a federal
20 search warrant in the Eastern District of Virginia
21 for a personal computer, et cetera that was
22 obtained on the 10th of April 2002. Did you at
23 that time get into the hard drive and uncover the
24 communications that are referenced in this
25 application for a complaint?

1 MS. HUDSON: Objection, Your Honor.

2 THE COURT: What's the basis?

3 MS. HUDSON: I think that goes to
4 discovery.

5 MR. MILLER: That goes to bail also,
6 Your Honor, as to when he got the
7 information. Because I don't -- I think that
8 does go to bail.

9 THE COURT: Why?

10 MR. MILLER: Because of timeliness and
11 whether -- and risk factors and other issues
12 that come up under the statute, that's why.
13 And so --

14 THE COURT: You must be looking at
15 different laws than I look at, or you look at
16 them differently than I do. I just don't
17 know where you're going and where you're
18 coming from. It's an enigma to me. I'm
19 giving you some latitude. Answer the
20 question.

21 Q. Is that where you uncovered the
22 electronic communications you reference in your
23 affidavit -- pursuant to that search warrant in
24 paragraph six?

25 A. No. There were other -- they were

1 coming from two different sources.

2 Q. Okay. By that time, did you have the
3 communications that you referenced in your
4 affidavit -- except for the letter that's dated
5 obviously the 30th of August?

6 MS. HUDSON: Request for clarification.

7 By what time, Your Honor?

8 MR. MILLER: April the 10th, 2002.

9 Paragraph six, third -- fifth words, top
10 of -- top line.

11 MS. HUDSON: Same objection from the
12 Government, Your Honor. I think it goes to
13 discovery.

14 THE COURT: You're going to have to
15 show me why it's relevant to bail.

16 MR. MILLER: What did they know and
17 when did they know it is relevant to bail
18 relative to the charges, Your Honor.

19 THE COURT: I don't get it. I'm in the
20 zone. What they knew and when they knew
21 it -- I'm just totally in the ozone when you
22 say that, Mr. Miller.

23 MR. MILLER: It relates to their
24 assessment of risk.

25 THE COURT: I could care less about his

1 assessment of risk. I care about the
2 pretrial services and everything else about
3 his background, all of the things that the
4 Bail Act says.

5 MR. MILLER: And the Bail Act deals
6 with strength of case as an issue which is an
7 area I'm addressing. Strength of case is an
8 issue and whether or not they have engaged in
9 flagrantly illegal conduct that affects the
10 strength of their case is an issue that I
11 would like to address.

12 THE COURT: I've never seen that in any
13 of the cases that I've read in 21 years.
14 Well, the Bail Act hasn't been around for 21
15 years, but I've never seen that.

16 MR. MILLER: Strength of case is under
17 the statute.

18 THE COURT: Strength of case is there,
19 but whether something is legal or illegal is
20 not something I'm to consider, and that's
21 statutory.

22 MR. MILLER: It's not something that
23 you're to consider on the question of
24 admissibility of evidence before you, but it
25 is something the Court's entitled to consider

1 on the issue of strength of case. And I have
2 had cases where clients have gotten bail on
3 that issue because it was so clear. And in
4 some cases it wasn't even known to the
5 attorney of the United States.

6 THE COURT: I can tell you if it's so
7 clear it would certainly be clear enough to
8 me. And this is so fuzzy.

9 MR. MILLER: It will be when I argue
10 it, but I need to lay the factual predicate
11 for it.

12 THE COURT: Go ahead.

13 Q. Did you at that time have the other
14 communications outside of what you developed from
15 the computer?

16 THE COURT: I think this is a ruse. I
17 really think it's a ruse to get discovery. I
18 so find, and unless you can ask questions
19 that are more articulate and more directed
20 toward the probable cause that's stated in
21 here, I'm going to cut you off and I'm going
22 to sit you down. I think it is a design to
23 get information that you're not entitled to
24 get on a probable cause hearing.

25 MR. MILLER: Well, Your Honor --

1 THE COURT: And I'm not criticizing you
2 for trying to do it. I just think the jig's
3 up.

4 MR. MILLER: Well, in paragraph seven
5 they talk about a communication dated
6 February 3rd, 2002. If they had that on
7 April the 10th, that goes to my timeliness
8 issue, which is a factor that under the code
9 I have to argue to the Court on the bail
10 question.

11 THE COURT: Just ask the simple
12 question.

13 Q. Did you have that February 3rd
14 communication that you reference in paragraph
15 seven when you obtained the search warrant in
16 April as referenced in paragraph six?

17 A. I'm not certain.

18 Q. Did you have it around that time, if
19 not exactly on that date? I'm not trying to pin
20 you down to a calendar date with some kind of
21 trick, but around that time.

22 A. I don't know.

23 Q. Would it be fair to say that you had
24 most of the communications by June of 2002 other
25 than the letter of August the 30th? I'm excluding

1 that from my question.

2 A. I don't know if I could say that would
3 be fair to say.

4 Q. Do you have your notes and your files
5 with you of your investigation?

6 A. Not all of them.

7 Q. Do you have some of them?

8 A. A few of them, yes.

9 MS. HUDSON: Objection, Your Honor.

10 THE COURT: He can answer whether he
11 has them.

12 MS. HUDSON: Yes, sir, and I'm maybe a
13 little premature.

14 THE COURT: Maybe so.

15 Q. Do they reflect writings of yours
16 regarding the evidence that's contained in this
17 affidavit?

18 MS. HUDSON: Objection, Your Honor.

19 THE COURT: This is totally discovery.

20 MR. MILLER: 5.1, Your Honor, says I'm
21 entitled to it.

22 THE COURT: Let's go to 5.1.

23 MR. MILLER: 5.1(e). And it is
24 discovery, 'cause every time you ask a
25 question you discover something you didn't

1 know before -- excuse me, not 5.1(e), 5.1(d),
2 which references Rule 26 and applies Rule 26.

3 THE COURT: Well, Rule 26 are the
4 statements of the accused.

5 MR. MILLER: No, sir.

6 THE COURT: Why don't we go there and
7 read it.

8 MR. MILLER: Please. Thank you.

9 THE COURT: What do you say about that,
10 Ms. Hudson?

11 MS. HUDSON: I'm just through Paragraph
12 A. As far as I can see, Paragraph A refers
13 to any statement of the witness. I don't
14 think that Agent Lauziere's notes with regard
15 to -- in the context of the question that
16 Mr. Miller asks will be covered under that
17 rule. I think if he had testified in a
18 proceeding under oath --

19 THE COURT: These are all directed
20 toward a witness who is called and has given
21 a statement at a previous time. It doesn't
22 have to do with this man's field notes.

23 MR. MILLER: It is Jenks material
24 applied to trials and Jenks material applied
25 to preliminary hearings. And if he wrote it

1 and it's his statement, it's a Jenks Act
2 statement. The Jenks Act is not limited to
3 testimony. Rule 26 is not limited to
4 testimony. And Rule 5.1(d) is not limited to
5 testimony and they don't say so and the cases
6 say otherwise.

7 THE COURT: I was on the committee when
8 this rule was amended at least to that
9 extent. And my recollection of the
10 discussion of the rules committee was that
11 this dealt with witness statements that would
12 otherwise be producible, that -- not just the
13 Defendant's statements, but witness
14 statements that would be producible either
15 under other provisions of law or the Jenks
16 Act. And this does not deal with the record
17 of his notes. They're the statements of any
18 witness that has made a previous statement.

19 MR. MILLER: No, they -- he's the
20 witness.

21 THE COURT: Overruled -- I mean I
22 sustain the objection.

23 MR. MILLER: Just so I make what my
24 position is clear, if I may do that, Your
25 Honor.

1 THE COURT: If he's got a statement of
2 a witness that he is relying on at this time
3 to -- in these proceedings, that's fine. But
4 he's establishing the overall basis of
5 probable cause.

6 MR. MILLER: What he's doing is one
7 thing and whether it's establishing probable
8 cause or testifying at trial is not the issue
9 because the rules apply the procedural
10 entitlement to statements in both contexts.
11 So the question before the trier of fact is
12 not the question before the Court at this
13 point in time. The question before the Court
14 at this point in time is when a person
15 testifies as a witness, which for the record
16 this agent is doing, then statements by that
17 testifying witness, who is this agent, which
18 would fit the Jenks Act, as the Court just
19 correctly observed, are producible under Rule
20 5.1(d) as they would be under 26.

21 MS. HUDSON: Can we refer to Paragraph
22 F of Rule 26.2, Your Honor, for the
23 definition of a statement, which includes a
24 written statement made by the witness that is
25 signed or --

1 THE COURT: Exactly.

2 MS. HUDSON: -- otherwise adopted or
3 approved, a verbatim recital of an old
4 statement made that is recorded. And three,
5 a statement however taken where there's a
6 transcription made by a witness to a grand
7 jury. I don't see how his field notes are
8 covered under that definition.

9 MR. MILLER: They are covered because
10 they are statements of his that he made and
11 which he signed.

12 MS. HUDSON: We haven't established
13 that anything was signed, Your Honor.

14 MR. MILLER: Well, I was cut off in the
15 middle of establishing my foundation.

16 MS. HUDSON: Because I think that --

17 THE COURT: I don't think it applies to
18 this kind of statement. I think it applies
19 exactly to what -- and if you read the
20 committee notes to the rules in 1993, that's
21 exactly when I served on the committee and it
22 was clear that they weren't trying to create
23 something other than an opportunity for the
24 person to get a copy of any statements that
25 were made by a witness in the form -- you

1 know, Paragraph F really defines what a
2 statement of a witness is. So I sustain the
3 objection. This is not general discovery. I
4 sustain the objection.

5 MR. MILLER: Your Honor, just for the
6 record so that I'm clear -- I'm not trying to
7 fight the Court, but I need to make my point.

8 THE COURT: First case I've had
9 litigated under -- I mean, if what you say is
10 true, I will say this, that it was totally
11 foreign to the thinking of the committee at
12 the time that the rule was amended, because
13 they didn't intend to open this up for
14 general discovery. What they wanted to do
15 and clearly did do was to make statements
16 that would otherwise be available as set
17 forth in F available at a preliminary
18 examination so that at least they could be
19 cross examined. And I think you've gone
20 beyond that.

21 MR. MILLER: Just for the record, Your
22 Honor, the -- a DEA 6 or an FBI 302 fits
23 Jenks Act statements. And that's what I'm
24 asking for from this agent. And then there's
25 another issue that I haven't addressed yet

1 that I'd like to. But that's what I asked
2 for.

3 MS. HUDSON: That's not what Mr. Miller
4 asked for, Your Honor. I disagree.

5 THE COURT: He sure didn't.

6 MR. MILLER: I'm asking for his own
7 investigative notes, which is what a DEA 6 or
8 a 302 is.

9 MS. HUDSON: Then we disagree with that
10 definition.

11 THE COURT: I agree with the Government
12 and disagree with Mr. Miller, except to the
13 extent if he'd asked for those particular
14 things it's a different animal.

15 Q. Do you have signed reports of
16 interviews with witnesses on which you relied in
17 preparing this affidavit?

18 MS. HUDSON: Objection, Your Honor.
19 He's asking about signed reports of
20 interviews of other witnesses.

21 MR. MILLER: No, does he have his
22 reports of interviews with witnesses that
23 contain statements of others on which you
24 rely that I would like to have produced for
25 cross examination.

1 THE COURT: This is discovery. I
2 sustain the objection.

3 MR. MILLER: The Court indicated that
4 we would be entitled to certain statements of
5 witnesses under the rule, and that's what I'm
6 asking for.

7 THE COURT: Let me -- can I tell you
8 the trouble? I'm going to put it on the
9 record. You dance around all over with
10 superfluous stuff, and then when you get down
11 to the stuff that really matters, you get the
12 Court in a position of being so pressed to
13 the wall about what you're really trying to
14 do that it can't distinguish the good from
15 the bad. And I don't think I'm in a position
16 that's different from any other court. When
17 you can't distinguish whether you're trying
18 to get good stuff that you can get from the
19 bad stuff that you're not supposed to get,
20 oftentimes you don't get anything at all.
21 Now, you've put me in that position,
22 Mr. Miller, and you're a good lawyer, and I'm
23 not criticizing it, except that you've got it
24 in a position that the Court is caught
25 between the rock and the hard place and

1 either you get me out by articulating what
2 you need or you're not going to get anything
3 at all.

4 MR. MILLER: He has -- or ought to have
5 sworn statements of other witnesses that were
6 referenced in some of these search warrant
7 affidavits that would be producible under
8 what I understood the Court's ruling to be.

9 THE COURT: Well, the Court's ruling is
10 by the seat of its pants, because all of
11 y'all are flying around taking cheap shots at
12 one another because you don't -- you've got
13 it in such an indirect way that you put the
14 Court off in the na-na land from the very
15 beginning. Now, look, Mr. Miller. You
16 either confine yourself to the precision with
17 which these statements are to be, or I'm not
18 going to let you ask the questions. You can
19 go fishing, but not in this court.

20 MR. MILLER: Your Honor, I have asked
21 for statements like I requested here.

22 THE COURT: A written statement made by
23 the witness that is signed or otherwise
24 adopted or approved by the witness.

25 MR. MILLER: Correct. That's what I'm

1 asking for.

2 THE COURT: But you didn't ask the
3 preliminary question of whether he relied on
4 any of those such things in order to produce
5 this provision.

6 MR. MILLER: I think there are two
7 parts --

8 THE COURT: I'm not going to sit here
9 all day and listen to this. This is not a
10 trial of the case, Mr. Miller, and it's not
11 discovery. It's probable cause.

12 MR. MILLER: But --

13 THE COURT: No. Don't even argue. Ask
14 the question, I'll rule on any objection, and
15 we'll move to the next question.

16 Q. You heard the Court's observations. Do
17 you have any statements that fit that description
18 with you here today?

19 THE COURT: As pertains to what?

20 MR. MILLER: As pertains to the
21 affidavit that you presented to the Court on
22 probable cause and facts in support of it.

23 MS. HUDSON: Your Honor, I think the
24 question is too broad.

25 THE COURT: Sustained.

1 MS. HUDSON: May I ask -- can we switch
2 over to direct examination and let me ask
3 Mr. Lauziere these questions, 'cause I
4 agree --

5 THE COURT: Procedurally --

6 MS. HUDSON: Because I understand the
7 rules of 26.2 and if there is anything that
8 we have that fits in that description we'll
9 be happy to turn it over.

10 THE COURT: That's fine.

11 BY MS. HUDSON:

12 Q. Inspector Lauziere, do you have any
13 statement that you have signed or adopted upon
14 which you relied for your representations in your
15 affidavit?

16 A. No.

17 Q. Do you have any transcript that was
18 made from a grand jury testimony pertaining to
19 anything that you relied on in this affidavit?

20 A. No, I do not.

21 Q. Or have you testified in the grand jury
22 about this case?

23 A. No.

24 Q. And do you have any -- are you in
25 possession of any transcript of any kind, a

1 stenographic, mechanical, electrically, or
2 otherwise recorded transcript of any oral
3 statement that you have made with regard to
4 anything in this case?

5 A. No.

6 MR. MILLER: May I ask one preservation
7 question just for the record?

8 THE COURT: You can always ask a
9 question.

10 BY MR. MILLER:

11 Q. Do you have any sworn statements of
12 others on which you relied in the preparation of
13 the affidavit?

14 MR. MILLER: I'm just doing this for
15 the preservation of the record, Your Honor.
16 I know what the Court's ruling about my
17 request to produce them, but I want to
18 establish whether or not they exist.

19 THE COURT: Let me just start off with
20 this. Rule 26.2 starts with these words.
21 When a witness other than the Defendant has
22 testified. This is the witness.

23 MR. MILLER: I understand, Your Honor.

24 THE COURT: All right. Cool. They
25 have to be his statements.

1 MR. MILLER: Or -- I think or adopted,
2 but I'm not going to belabor the point. I
3 think adopted also fits.

4 THE COURT: I understand.

5 MR. MILLER: If he adopted them in the
6 search warrant that he got in Richmond for
7 example, that would be an adopted statement
8 that would fit. And if he adopted them here
9 as he did by reference and incorporation, I
10 think it would be a statement of his that he
11 adopted in a sense.

12 THE COURT: I understand where you're
13 going, and it's not illogical now that you've
14 put it in that framework. But it's taking an
15 awful long time to get there.

16 MS. HUDSON: For the record, Your
17 Honor, we disagree with that statement of --
18 it is a statement by the witness, so it would
19 have to be Mr. Lauziere's statement.

20 THE COURT: Right. And when it says
21 adopted, it means a statement that is adopted
22 by the witness or otherwise approved by the
23 witness. And it deals with the same thing
24 that if he's made a statement or adopted a
25 statement by inaction or action that he's

1 made on some previous occasion or has
2 approved a statement that he's made on some
3 previous occasion, it comes in. I agree with
4 the Government's representation, so I sustain
5 the objection. It's not whether he's adopted
6 somebody else's statement as his, it's
7 whether he's adopted his own statement on
8 some other occasion.

9 Q. Turning your attention from paragraph
10 seven to paragraph eight where you indicate the
11 conclusion you reached based on the review of the
12 records you reference in paragraph eight, did you
13 have any basis other than the records themselves
14 for the conclusion you reached, is the first
15 question?

16 MS. HUDSON: Objection.

17 THE COURT: Overruled.

18 A. The question again is --

19 Q. Yes, you -- the conclusion you reached
20 in paragraph eight regarding sexual activity based
21 on review of documents, okay, is there any other
22 evidence outside of the review of documents in
23 which --

24 THE COURT: That's a different
25 question.

1 MS. HUDSON: Objection, Your Honor.

2 THE COURT: Sustained.

3 Q. Do you have any evidence outside of the
4 documents that support that conclusion?

5 MS. HUDSON: Objection, Your Honor.

6 THE COURT: Sustained.

7 Q. In paragraph nine, you indicate that
8 you learned about telephone calls. Did you listen
9 to those calls for the purpose of preparing that
10 paragraph?

11 A. No, I had not.

12 Q. Did you have a report from someone who
13 had listened to those calls in preparing that
14 paragraph?

15 A. I had information from law enforcement
16 officers about those calls.

17 Q. Do you know the source of that
18 information?

19 A. Yes.

20 Q. Was it the calls themselves?

21 A. Yes.

22 Q. Do you know whether or not the law
23 enforcements officers also played those calls for
24 civilians?

25 MS. HUDSON: Objection, Your Honor.

1 THE COURT: Sustained.

2 Q. So the content of paragraph nine is the
3 conclusion an officer gave you based on what they
4 told you they heard and you did not hear yourself?

5 MS. HUDSON: Objection, Your Honor.

6 THE COURT: Sustained.

7 MR. MILLER: That's under Leon, Your
8 Honor. That's a direct --

9 THE COURT: You can argue that to me.

10 MR. MILLER: But I've got to establish
11 the factual predicate for it before I can
12 argue it to you.

13 THE COURT: You just did. You asked
14 him those questions.

15 Q. In paragraph 10, did you interview the
16 prisoners referenced in paragraph ten yourself?

17 A. No, I did not.

18 Q. Did you interview the jail personnel in
19 paragraph 10 -- that are mentioned in paragraph 10
20 yourself about the content of paragraph 10?

21 A. I spoke with people at the jail as
22 well. I wouldn't characterize it as an interview,
23 but I spoke with them.

24 Q. So the content of paragraph 10 is
25 third-hand hearsay related to you by others as

1 opposed to your direct interview with people
2 who've claimed to have heard the conversations; is
3 that correct?

4 MS. HUDSON: Objection, Your Honor.

5 THE COURT: I think he can ask the
6 question whether he interviewed any of the
7 prisoners.

8 MS. HUDSON: Which he did, I think. If
9 he didn't, I apologize. But I'm objecting to
10 him referencing a conclusion that anything
11 was third-hand hearsay.

12 THE COURT: I'll sustain the objection
13 to the form of the question.

14 Q. You did not interview the prisoners?

15 A. No, I did not.

16 Q. The information you have comes from
17 others reporting what they claim the prisoners
18 told them?

19 A. That is correct.

20 Q. And in some instances it comes from
21 others reporting what someone else said the
22 prisoners said, as a third person; A tells B, B
23 tells C, C tells you?

24 A. Some pieces.

25 Q. Okay. In paragraph 11 you indicate the

1 nature of the evidence in relationship to the
2 offenses referenced in paragraph 11 at the
3 beginning of paragraph 11. Were you present for
4 those court proceedings? Is that based on your
5 own first-hand knowledge?

6 MS. HUDSON: Your Honor, could I ask
7 for clarification? He says there is a
8 reference to the evidence in the case. I'm
9 not seeing that in paragraph 11.

10 MR. MILLER: He references arrest on
11 August the 1st, then he says why, November
12 the 10th, and he talks about the fact that --

13 THE COURT: The simple factual question
14 is, were you present at any time during any
15 proceedings in the state court relating to
16 those charges.

17 THE WITNESS: Yes, I was in J&D court
18 one time when Mr. Bray was there.

19 Q. Which one of these two was it?

20 A. I don't recall. I don't know. I'd
21 have to look back and see which one of those cases
22 it would have been.

23 Q. Would it be correct to say that the
24 event of November the 10th involved him being in
25 an automobile with his daughter and "B?"

1 MS. HUDSON: Objection, Your Honor.

2 THE COURT: On what basis?

3 MS. HUDSON: Again, to relevance.

4 We've alleged no facts on the November 10th
5 incident. It's beyond our affidavit and has
6 nothing to do with the establishment of
7 probable cause.

8 MR. MILLER: I read in there that he
9 claims that it involved sexual contact or
10 attempted sexual contact. And November the
11 10th did not, and I want to know whether he's
12 aware of it.

13 THE COURT: It says what it says.

14 MR. MILLER: But he lumps the two
15 together and I'm trying to distinguish the
16 issues for the Court.

17 MS. HUDSON: Your Honor, Mr. Miller
18 will have an opportunity to establish if he
19 can that he was not arrested on these dates
20 for contributing to the delinquency of a
21 minor.

22 MR. MILLER: That's not what they say.

23 MS. HUDSON: That's how I'm reading the
24 first sentence in paragraph 11.

25 MR. MILLER: If they want to leave the

1 first sentence and strike the second -- the
2 rest of it, I agree. Fine.

3 THE COURT: I'm not asking that they do
4 anything. I'm reading the whole paragraph as
5 a whole.

6 MR. MILLER: Then I get to examine the
7 validity of the paragraph as a whole and
8 whether or not it speaks the truth.

9 THE COURT: Well, let me just ask this.
10 On November -- I mean on August the 1st, 2001
11 and on November the 10th, 2001, is it your
12 information that Mr. Bray was in court on
13 charges?

14 THE WITNESS: Yes.

15 THE COURT: And can you tell the Court
16 whether you were present on either one or
17 both of those occasions?

18 THE WITNESS: Your Honor, I was in
19 court for a contributing to the delinquency
20 of a minor charge relative to Mr. Bray, and I
21 do not recall which one of those it was.

22 THE COURT: Can you tell me whether it
23 was relative to minor "A" or minor "B?"

24 THE WITNESS: It was relative to minor
25 "A."

1 THE COURT: Can you tell us whether you
2 became aware of the instances concerning
3 minor "A" that led to the delinquency charge?

4 THE WITNESS: Yes, I did.

5 THE COURT: Go ahead, Mr. --

6 Q. The incident giving rise to the charge
7 of the 10th of November, focusing on that, isn't
8 it a fact that that incident involved Mr. Bray and
9 "A" in an automobile with one of Mr. Bray's
10 daughters after a football game, without more?

11 A. I don't know that.

12 Q. Do you know that that's not true?

13 A. I don't know that.

14 Q. One way or the other?

15 THE COURT: That's what he just said.

16 He doesn't know.

17 A. I don't know.

18 Q. Are you certain that there was an
19 arrest on August the 1st, 2001?

20 A. Based on the criminal history record,
21 yes.

22 Q. Do you have that criminal history
23 record?

24 A. I believe I have a copy of it.

25 Q. Would you refresh your recollection and

1 see whether or not it was August the 1st or a July
2 arrest?

3 MR. MILLER: Just for the record, Your
4 Honor. I think that my review of his record
5 gives me a conflict with that date and I'd
6 like -- I'm not asking to go read all his
7 files. I just want him to look at that
8 record.

9 THE COURT: He can look.

10 THE WITNESS: I will. I don't see that
11 one in my file right here right now. I can
12 expand a little bit. I also relied on copies
13 of -- at least the face copy of the CCRE or
14 the arrest report for that date.

15 Q. Isn't it a fact that there was -- that
16 the earlier arrest, which may not have been August
17 the 1st, involved a long night motorcycle ride and
18 that the evidence at trial showed that Mr. Bray
19 had taken "A" on a long night motorcycle ride to
20 Fredericksburg and back?

21 MS. HUDSON: Objection.

22 MR. MILLER: He says he was in court.

23 THE COURT: Sustain the objection. My
24 recollection is that a conviction merges the
25 evidence into whatever was the conviction.

1 MR. MILLER: Your Honor, there's an
2 allegation here that's specific and if the
3 Court will strike that allegation then I
4 don't need to prove --

5 THE COURT: I'm not going to strike
6 anything. Sustain the objection.

7 MR. MILLER: Fine, Your Honor, but I --

8 THE COURT: I sustain the objection.

9 MR. MILLER: For the record, Your
10 Honor --

11 THE COURT: I sustain the objection.

12 MR. MILLER: Yes, Your Honor.

13 THE COURT: What's your next question?

14 Q. Isn't it a fact that there is no
15 evidence of acts of delinquency involving sexual
16 activities and attempted sexual conduct in either
17 of those two cases?

18 A. It was my understanding that it did.

19 Q. What's the source of your
20 understanding?

21 A. Information from law enforcement
22 officers.

23 Q. Okay. So -- and it is fair to say that
24 you're not able to stand here and say it's based
25 on what was produced at trial?

1 THE COURT: Mr. --

2 MR. MILLER: He was there one time,
3 Your Honor.

4 THE COURT: Listen to me. Are you
5 challenging this statement: Bray was
6 convicted and sentenced to terms of probation
7 as well as a three-month jail sentence for
8 those crimes. Are you challenging that?

9 MR. MILLER: No, I'm in the next
10 sentence, Your Honor.

11 THE COURT: Well, that's okay if you're
12 not challenging that. I'm striking all of
13 that from consideration. Not from the
14 record, but from consideration.

15 MR. MILLER: All right, Your Honor.

16 THE COURT: I could care less what the
17 evidence was. I'm not going to retry it and
18 I'm not going to allow inquiry about its
19 substantiality because he was convicted and
20 that ends the matter. Next question.

21 Q. Now, do you know Detective Garland
22 Mills?

23 A. Yes, I do.

24 Q. Do you know that Detective Garland
25 Mills has been involved in all of Mr. Bray's

1 cases?

2 MS. HUDSON: Objection, Your Honor.
3 Relevance.

4 THE COURT: Sustained.

5 MR. MILLER: Relevance to paragraph 12,
6 Your Honor.

7 MS. HUDSON: We continue our objection.
8 Whether Mr. Mills's name is in this has no
9 bearing on whether he was involved in other
10 cases or not. This is a hearing about
11 whether there is PC contained in this
12 affidavit to establish that Mr. Bray violated
13 24.22 of Title 18.

14 THE COURT: I agree.

15 MR. MILLER: The last sentence of
16 paragraph 12 is inaccurate and false. There
17 have been no convictions and I believe
18 Garland Mills knows that and made that
19 available to this agent.

20 THE COURT: Why don't you ask if he
21 knows his conviction record?

22 MR. MILLER: I want to establish
23 Mr. Mills's involvement -- the length of
24 involvement in the case and lay a
25 foundation --

1 MS. HUDSON: Paragraph 12 alleges no
2 convictions, Your Honor.

3 THE COURT: Might be great for a jury
4 Mr. --

5 MR. MILLER: No, Your Honor --

6 MS. HUDSON: It says he was charged.

7 THE COURT: But it's just not making
8 any hay.

9 MR. MILLER: It says -- the last
10 sentence says the dispositions are unknown
11 and they are known.

12 MS. HUDSON: They're not known --

13 THE COURT: It does not say that.

14 MR. MILLER: It says --

15 THE COURT: Wait a minute. What was
16 the first thing you just told me, that
17 they're unknown. Do you remember saying that
18 word?

19 MR. MILLER: Yes. Exactly.

20 THE COURT: That is not what the
21 affidavit says. It says the dispositions of
22 those arrests have not been ascertained. Far
23 different. Got any other questions?

24 MR. MILLER: I consider that to be --

25 THE COURT: I sustain the objection.

1 MR. MILLER: And I did not intend --

2 THE COURT: I don't care what you
3 consider --

4 MR. MILLER: All right, Your Honor.

5 THE COURT: -- for that purpose. I do
6 care what you consider, but I don't care what
7 you consider for those purposes. Your
8 statement to me was factually inaccurate.

9 MR. MILLER: It was not intended to be
10 inaccurate. The reading of the plain
11 language of that sentence --

12 THE COURT: Well, you just answered the
13 question for your witness. So go ahead.

14 MR. MILLER: Actually it's the
15 Government's witness, but that's all right,
16 Your Honor.

17 Q. In paragraph two on Page 2 --

18 THE COURT: You know, I'm almost
19 willing to use the Eastern District struck
20 jury system here. Once you pass up a
21 paragraph you can't go back and inquire about
22 it.

23 MR. MILLER: I'm not aware of that
24 rule, Your Honor.

25 THE COURT: Once you pass up a juror in

1 the Eastern District of Virginia, you can't
2 go back and strike.

3 MR. MILLER: And you are advised of
4 that when the trial begins and they don't
5 change the rules in the middle of the game.

6 THE COURT: I'm not going to be here
7 but another three or four minutes on probable
8 cause, Mr. Miller.

9 Q. Isn't it a fact in paragraph two that
10 the police have photographs of Mr. Bray right when
11 they entered the room and he was clothed and "A"
12 was clothed -- wearing clothes?

13 MS. HUDSON: Objection, Your Honor. I
14 think it goes to discovery. I think he could
15 ask how Mr. Lauziere knows the contents of
16 the information in paragraph two, but I think
17 this question goes to discovery --

18 THE COURT: I agree. Sustained.
19 Whether he was clothed at some time does not
20 go to whether the statement is true or false
21 concerning the fact that his pants were down.

22 Q. Isn't it a fact that his pants were not
23 down and he was clothed and the police don't have
24 any information to the contrary?

25 A. That's not what I was told.

1 Q. Isn't it a fact that they have
2 photographs that show that that statement's
3 inaccurate?

4 MS. HUDSON: Objection, Your Honor.
5 This has been asked and ruled on already by
6 the Court.

7 THE COURT: He can ask if he reviewed
8 photographs and he can say whether he did or
9 didn't.

10 MS. HUDSON: That wasn't his question.

11 THE COURT: I understand. Sustain the
12 objection.

13 Q. Did you review photographs that were
14 taken right upon entry that showed that he was
15 dressed?

16 A. I did not review photographs.

17 MR. MILLER: No other questions.

18 THE COURT: Any further questions?

19 MS. HUDSON: No, Your Honor.

20 THE COURT: I find probable cause.

21 MR. MILLER: Your Honor, may I put a
22 couple points on the record, please?

23 THE COURT: Sure. You can step down,
24 Mr. Lauziere.

25 MS. HUDSON: We're going to have some

1 evidence with regard to bail.

2 MR. MILLER: This won't be long, Your
3 Honor. The conclusory paragraphs to which
4 I've made reference under Leon are not a
5 basis for probable cause. And if you strike
6 them from this, then you're in a circumstance
7 where there's not probable cause for the
8 offense because it's no direct evidence of
9 how or where anything came from. It's all
10 conclusory. In Leon there were key core
11 points on which the court relied. One was in
12 deference for magistrates' decisions. Then
13 when they finished that analysis they went on
14 to say that that deference and preference is
15 not boundless and that there are
16 circumstances for which that deference will
17 not apply. One was the Jenks issue. The
18 second one was -- and the one on which they
19 spent more elaboration -- was where the
20 affiant provided the judicial official with
21 conclusions that they had reached lacking a
22 factual predicate for the court to make its
23 own independent determination. So when
24 someone says, someone said that someone said
25 that someone said and this is the conclusion

1 that they reached, or this is what someone
2 said happened here and this is the conclusion
3 they reached then there are no factual bases
4 for it provided to the decider even in an ex
5 parte secret one-on-one meeting with an
6 affiant in a court, let alone in an
7 adversarial proceeding. So if it doesn't
8 stand muster for a finding of probable cause
9 in what is allowed to be an ex parte secret
10 meeting between an affiant and judicial
11 official, then it cannot stand muster in a
12 proceeding where there's an adversarial
13 process and there are wholly stated
14 conclusions without the factual predicate.
15 So the affidavit to that regard fails.

16 MS. HUDSON: May I respond, Your Honor?

17 THE COURT: Sure.

18 MS. HUDSON: Just for the record, even
19 if this Court only relied on the very clear
20 facts in Attachment A, which is a transcript
21 of an e-mail sent by Mr. Bray to a minor
22 child, and Attachment C, which is a letter
23 that he wrote also to a minor child while
24 incarcerated on charges for contributing to
25 the delinquency of a minor, the Government

1 would have far exceeded its burden to
2 establish probable cause.

3 THE COURT: I agree with that, but I
4 also believe that this witness has testified
5 that people who would otherwise be considered
6 to be reliable sources for information have
7 given him information. Whether it is all
8 true in fact after full trial on the merits
9 of the case is not a consideration as to
10 whether there's probable cause based on the
11 fact that the information was garnered from
12 sources that people in my position or in any
13 other judicial position can reasonably rely
14 on to determine whether the facts exist from
15 a probable cause standpoint. That this
16 witness didn't do an investigation of the
17 sources of -- that is of the information
18 itself is not required either by the
19 Constitution or by any decisional authority
20 that I'm aware of. And I believe that there
21 is a reasonable basis upon which this Court
22 not only issued the warrant but upon which
23 the Court can find probable cause that this
24 man committed the offenses with which he is
25 currently charged. So I find probable cause.

1 You may proceed.

2 MS. HUDSON: Your Honor, actually I
3 misspoke. Our position is that pursuant to
4 Title 18 Section 31.56, this is a crime of
5 violence which is alleged in the affidavit
6 and therefore it's a presumption case and we
7 believe that it's Mr. Miller's burden to go
8 forward with reasons why he should be
9 released.

10 MR. MILLER: Your Honor, it's not a use
11 of force case. It doesn't require use of
12 force. If you look at 31.56-4 for crimes of
13 violence, it has to have an element of the
14 offense, the use, attempted use, or
15 threatened use of physical force. That's not
16 an element of the offense that's before the
17 Court in the complaint that I have. The
18 complaint that I have is under 18 U.S.C. and
19 it involves the enticement. And the crime is
20 the enticement. The crime does not require
21 that the enticement was successful.

22 THE COURT: How about Paragraph B?

23 MR. MILLER: Paragraph B says --

24 THE COURT: Or any other offense that
25 is a felony and that by its nature involves a

1 substantial risk that physical force against
2 a person may be used.

3 MS. HUDSON: Your Honor, it's even more
4 specific than that in Paragraph C. It's any
5 felony under chapters defined there beginning
6 with sections 22.41 ad sec. This is section
7 22.42. It's specifically statutorily
8 designated as a crime of violence.

9 MR. MILLER: Your Honor, I would say
10 that under 22.42 because the statute requires
11 only proof of the verbal act with the
12 motivation behind it that it's not an element
13 and it's not an act of violence and it
14 doesn't create --

15 THE COURT: I'm not going to second
16 guess Congress. They put it in there. By
17 my, you know, pitiful little reading, 22.41
18 ad sec includes 22.42, by my pitiful little
19 reading. So therefore the burden is on you.

20 MR. MILLER: All right, Your Honor. I
21 would then indicate to the Court the
22 following. Mr. Bray has no convictions of
23 violence, no convictions of failure to
24 appear, and no convictions outside of the
25 charges related to this case and the time

1 frame that's in your complaint. The
2 contributing incident, number one, state
3 charge, involved a motorcycle ride in July
4 with "A" to Fredericksburg and back.
5 Mr. Dwoskin, who is state counsel for
6 Mr. Bray was there. She was out way late,
7 parents didn't know where she was. There was
8 no testimony presented at that case or on the
9 appeal of that case at any time that there
10 was any sexual or attempted sexual conduct as
11 contained in the affidavit in support of the
12 complaint. The second event of November
13 involved he, his daughter, and "A" in a car
14 after a football game. No attempted or
15 actual sexual conduct involved there. The
16 two cases in January of this year got bungled
17 into an arraignment that led to a period of
18 incarceration that is correctly reflected
19 here. And he did get convictions. Now, when
20 the police raided on the 15th of February of
21 2002 according to the photographs the
22 Commonwealth of Virginia showed to
23 Mr. Dwoskin in discovery that were taken
24 right upon entry, he was on the floor
25 clothed. He had some kind of gym shorts and

1 a shirt on, and she was clothed in blue jeans
2 and a tee-shirt. He was never shown any
3 photographs --

4 MS. HUDSON: Objection, Your Honor.
5 Mr. Miller is arguing facts not in the
6 record.

7 MR. MILLER: I'm proffering as I'm
8 entitled to do in a bail hearing. The
9 statute permits the defense to proffer.
10 Mr. Dwoskin is here. This is the discovery
11 he got in that case.

12 THE COURT: The statute permits it if
13 everybody's agreeable to it.

14 MR. MILLER: No, the statute permits it
15 unless the Court rules otherwise. If the
16 Court's ruling otherwise I'll call
17 Mr. Dwoskin and have him testify to the
18 discovery he got in that case.

19 THE COURT: Ms. Hudson?

20 MS. HUDSON: Your Honor, I'd have to
21 look at the rule again, but we do object to
22 the proffer and we think that the facts of
23 the underlying cases here are irrelevant. In
24 addition to that, Mr. Bray's refused to be
25 interviewed by the pretrial services officer,

1 so I just -- I can't fathom what
2 representation about the facts of alleged
3 underlying --

4 THE COURT: I'm not ever going to let
5 anybody out on bail unless they've conferred
6 with pretrial.

7 MR. MILLER: I advised pretrial this
8 morning when I got here because he was
9 arrested over the weekend. He and I talked.
10 I think it was Tuesday I found out from
11 Mr. Smith from pretrial that they had not
12 talked. I indicated to Mr. Smith that I
13 would get with Mr. Bray, which I did on the
14 phone, but he was in Orange. Mr. Smith --

15 THE COURT: I specifically remember --
16 and maybe this wasn't the case, but my
17 recollection is that I told him he needed to
18 talk to pretrial and if he didn't I could
19 actually use that against him.

20 MR. MILLER: He talked with me and
21 agreed to talk to pretrial as soon as he got
22 with me, which is after court, and I got
23 ahold -- and found out it was Mr. Smith who
24 at that time had the case. I talked with
25 Mr. Bray yesterday. He was in Orange.

1 They're not allowed to do any other kind of
2 calls. I got here early this morning an hour
3 before court to go to pretrial to advise them
4 about it. I found out earlier that Mr. Smith
5 was in Roanoke and as of 9:30 they weren't
6 sure who was going to cover the case. But I
7 did come to let them know, because Mr. Smith
8 had indicated to me --

9 THE COURT: Why is who covers the
10 case -- why is that relevant?

11 MR. MILLER: Because -- someone to talk
12 to him. Mr. Smith had indicated to me that
13 someone could talk to him before court.
14 That's why I got here early to make sure that
15 communication was clear and --

16 MS. HUDSON: We consider bond at this
17 point premature for consideration, Your
18 Honor.

19 MR. MILLER: Your Honor, you can have
20 the interview done this morning, today since
21 he's from Orange and save the marshals the
22 trouble of bringing him back and forth.

23 THE COURT: Which we do from time to
24 time. If he wants to talk to pretrial,
25 that's fine. But I'm not -- until I can get

1 a full background and verifications and all
2 that sort of stuff from pretrial services, I
3 don't think you can discharge your burden in
4 this case, 'cause I need to know about him.
5 I need to know about him from people who I
6 can count on.

7 MR. MILLER: I have counsel that
8 represented him at the bail hearing in
9 circuit court. And the representations that
10 were made there can be made to the Court.
11 It's a matter of record. We have a letter
12 from the probation parole officer from
13 District 9 dated the 19th, which I'll tender
14 to the prosecutor and to the Court. They're
15 aware that he's arrested here. He was
16 released on bail there. I don't think
17 there's any dispute about that. Mr. Dwoskin
18 will testify that he was released to the
19 address at which he was arrested. Probation
20 parole knew where he was. They sent this
21 letter to him which indicates that he is to
22 report to them after his release. They're
23 not seeking a violation. They're aware of
24 this charge. And he did get bond --

25 THE COURT: So he was on probation or

1 release when this offense occurred?

2 MR. MILLER: No, sir.

3 MS. HUDSON: He was actually
4 incarcerated on contributing to the
5 delinquency of a minor. The offense actually
6 encompasses a breadth of time, but...

7 MR. MILLER: All of the -- the officer,
8 Garland Mills, who is the prime investigator
9 in this case --

10 MS. HUDSON: Objection, Your Honor.
11 Les Lauziere is the -- Mr. Miller is trying
12 to create a record and we know why and --

13 THE COURT: I know what he's doing and
14 it's not having any effect.

15 MR. MILLER: Your Honor, Mr. Mills is
16 the officer in the state cases that -- and
17 he's the individual who approached
18 Mr. Lauziere.

19 MS. HUDSON: And this is a federal case
20 now, Your Honor, and Mr. Mills is not the
21 chief investigator in this case.

22 THE COURT: I'm not going to grant bail
23 until such time as he talks to pretrial and
24 we can have all of that put in context by the
25 pretrial services officer.

1 MR. MILLER: Can we do that now? Can
2 we have an adjournment for that to take
3 place?

4 THE COURT: Might be, but it's going to
5 be this afternoon.

6 MR. MILLER: That's fine.

7 THE COURT: What do I have scheduled
8 this afternoon? We'll adjourn and
9 reconvene -- are you available at 2:00?

10 MS. HUDSON: Yes, sir, I am.

11 MR. MILLER: That's fine. I just don't
12 think the marshals should have to go back and
13 forth more than once. I tried to get here
14 early to set it up. I didn't realize
15 Mr. Smith was going to be away.

16 THE COURT: I just want the marshal
17 service to know he has your interest at
18 heart. We appreciate that. 2:00.

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CERTIFICATE OF COURT REPORTER

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I certify that the foregoing is a correct
transcript from the record of proceedings in the
above-entitled matter.

Karina L. Chesbrough, Notary Public
Commonwealth of Virginia at Large

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